June 10, 2013

VIA E-MAIL

Whitney Brewster Executive Director Texas Motor Vehicle Division 4000 Jackson Avenue Austin, TX 78731

**Re:** Protest Rights Formal Opinion

Dear Director Brewster:

The Truck and Engine Manufacturers Association (EMA) is the trade association representing the manufacturers of medium and heavy-duty on-highway trucks and internal combustion engines that are used in a wide variety of on-highway, nonroad, marine, and stationary vehicles, equipment, and vessels. EMA's members manufacture and market virtually all trucks over 16,000 lbs sold and operated in Texas as well the engines used to power those vehicles

EMA is submitting these comments regarding the request by the Texas Automobile Dealers Association (TADA) under 43 TAC para. 215.4 for a formal opinion to clarify the protest rights for licensed and franchised engine, transmission, and axle dealers under Subchapter N, Chapter 2301, of the Texas Occupational Code ("Request"). In essence, TADA is asking the Board to rule that engine, transmission, and axle dealers have the same new point and relocation protest rights as do dealerships of line-make complete automobiles and trucks.

As the manufacturers of both the engines and heavy-duty vehicles that are the subject of the TADA Request, EMA and its members strongly oppose the Texas Motor Vehicle Division issuing a formal opinion that engine, transmission, and axle dealers have standing to protest an application to establish or relocate a dealership as outlined under Subchapter N, Chapter 2301 of the Texas Occupational Code.

As described below, franchised dealers of engines, axles, and transmissions are fundamentally different, and operate in a different manner than complete vehicle dealers. Those key differences negate any perceived need to tightly regulate or protect exclusive territories through protests and objections to the establishment of other franchised engine or service dealers. In point of fact, it is often necessary and in the best interest of vehicles owners and operators for engine manufacturers to grant such sales and repair franchises since the engines manufactured by one engine manufacturer are used across multiple vehicle brands and line-makes.

In support of the above position and our recommendation that the Board not issue a formal opinion in this matter, EMA provides the following comments:

## • Engines, as well as transmissions and axles, are components of motor vehicles that are used in multiple vehicle brands and line-makes and thus are not similar to automobiles.

Unlike the light-duty automobile manufacturing industry, heavy-duty vehicle manufacturers are not vertically integrated. A "branded" truck will have a chassis or tractor built by the named-manufacturer but is likely to have an engine from a different manufacturer, a transmission from a different manufacturer, and perhaps even a body or special equipment manufactured or added by others. The exact configuration and components are determined by the vehicle owner through a specification process at the time of purchase. As an example, the same model of a Cummins or Detroit Diesel engine could be found in a Freightliner, International, or Peterbuilt Truck. The same situation applies to axles or transmissions.

As a result, engine manufacturers do not have exclusive or "line-make" dealerships and repair facilities, but essentially have agreements with multiple vehicle manufacturers or dealers that use their engines (For example, see Exhibit 3 of the Request where the Cummins Dealership Agreement is non-exclusive). Thus, the concept and business model of exclusive dealer territories for a line-make of automobiles simply does not exist for engines used in heavy-duty trucks. It is, in fact, essential for the proper and necessary sales and service of heavy-duty trucks that engine - and other key component – manufacturers establish dealer/service agreements to address the needs of all the vehicle brands that installed their engines.

## • The line-make concept applies to the vehicle manufacturer and not component manufacturers.

The TADA Request for Formal Opinion is based on the definitions and requirements found in Chapter 2301 of the Texas Occupations Code. The request relies on the inclusion of engines, transmissions, and axles as part of the definition of motor vehicle in Section 2301.002(23) as well as the following regulatory section defining franchisee, dealers, and the various requirements governing the relationship between dealers and manufacturers in Texas.

Although there is no doubt that engines, axles, and transmissions are defined as motor vehicles for the purposes of Chapter 2301, in reality they are not motor vehicles but components of motor vehicles. The essential reason that they are specifically included in Chapter 2301 is so dealers can be reimbursed for warranty costs on those components at the same rate that they are reimbursed for warranty work on the rest of the vehicle (N.B. engine, transmission, and axle manufacturers generally retain warranty responsibility for these components separate the rest of the vehicle).

Nonetheless, their inclusion as part of the definition of motor vehicles creates artificial and unintended consequences, one of which is the application of the concept of line-make. Although line-make is not defined in Chapter 2301, the term is intended to mean a specific,

branded line of vehicles, such as Chevrolet, BMW, Volvo, or Freightliner Trucks. The Request cites a Board decision (Authobahn Imports Inc, d/b/a Autobahn Motorcars and Motor Vehicle Division Enforcement Section v. BMW North America, Inc.) that clarified the meaning of line-make.

The definition of line-make is relevant to the Request since the sections of Chapter 2301 dealing with Denial of License Application: Dealership (Section 2301.652) and the Right to Protest; Certain Relocations (Section 2301.6521) rely on the concept of line-make. In fact, those sections apply the right to protest and relief to "a franchised dealer of the same line-make." Thus, the concept of line-make is not only relevant to the issue, but the Board's decision appears to depend on a correct definition of line-make.

In terms of the heavy-duty vehicles over 16,000 lbs, the Board decision referenced above defines line-make as the branded vehicle manufacturer, i.e., Mack Trucks, International Trucks, Freightliner Trucks, or Peterbuilt Trucks. Those are clearly franchised dealerships with branded vehicles, and it would make common sense to apply the protest rights regarding new or relocated dealerships to those entities.

However, the stated definition of line-make cannot be applied to the components of those very same trucks such as engines, transmissions, and axles. Those components can be found in all line-makes of trucks. Any component franchise or dealership agreements are almost always associated with a line-make dealership, and because those components are found in multiple-branded vehicles, are generally not exclusive franchises. Consequently, the right of protest should not be granted to component franchisees or dealers since one cannot logically apply the concept of line-make to component parts, even though they are incorrectly defined as motor vehicles in the Texas regulations.

## • Granting the Subject Request will have unintended Consequences for Truck Owners and Dealers.

Granting the TADA Request to give engine, axle, and transmission dealers the right to protest new and relocated dealers will have significant unintended consequences. Those components are regularly used in a wide variety of trucks, and there is no brand exclusivity. An engine manufacturer may grant a dealer franchise to multiple truck dealerships in an area so that they can perform warranty repairs and replace engines for their particular brand of truck. This adds value to the dealership and also makes it easier for the owner/operator to get expert service and repairs of that component.

If the Board issues a formal opinion that component dealers and franchisees have the right to protest, that decision would allow a branded truck dealer that also is a franchisee for an engine manufacturer to protest the location of a different line-make truck dealer that is a franchisee for the same engine manufacturer. Thus, the Opinion will be used to protest a component manufacturer's efforts to service their equipment for all their branded partners as well as the location or relocation of different line-make dealers. Such a situation does not serve the best interests of owner/operators, engine manufacturers, or truck manufacturers.

Section 2301.001 of Chapter 2301 states that it is the goal of the State to ensure a sound system of distributing and selling motor vehicles and to prevent fraud, unfair practices, discrimination, impositions and other abuses. EMA believes that granting protest rights to heavy-duty vehicle component dealers and franchisees is not warranted and is counter to the goals stated in the regulations.

EMA opposes granting protest status to component dealers and franchisees and asks that the Board deny the subject Request for Formal Opinion.

Respectfully,

Joseph L. Suchecki

Joseph L. Suchecki Director, Public Affairs